IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ ~~1950~~ 1951

No. ~~18~~ 8, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

DEFENDANT'S PETITION FOR REHEARING

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OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

DEFENDANT'S PETITION FOR REHEARING

The State of Texas hereby petitions the Court for a rehearing of this cause and reconsideration of the majority opinion.

PRELIMINARY STATEMENT

For 114 years Texas has had possession and enjoyed full rights of ownership of the 2,608,774 acres of submerged land within its original boundaries herein sued for by the United States.[1]

[1] Texas' boundaries, established in 1836 and in existence at the time of annexation, included the lands covered by the shallow waters of the Gulf three leagues from shore the same as the rivers, lakes and uplands within its territory. The area is described as "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico *three leagues from land*, to the mouth of the Rio Grande . . . ." Texas Boundary Act, Dec. 19, 1836, 1 Gammel's Laws of Texas 1193; Texas' Brief, p. 58. (Emphasis supplied throughout.)

Although possibly the largest land suit in the history of this Court, this is not a case involving money and property alone. It is a public controversy of great magnitude between the national government and one of the United States involving an interpretation of the "proposals, guarantees, and conditions" of the international agreement under which that State, a former independent nation, entered the Union.

One of those "proposals, guarantees, and conditions" was that "said state, when admitted into the Union . . . shall also retain all the vacant and unappropriated lands *lying within its limits. . . .*"[2] For 103 years after this agreement, it was the consistent interpretation of officials of the United States[3] and

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[2] Sec. 2, Joint Resolution of the Congress of the United States, March 1, 1845. 5 Stat. 797. The "limits," embracing the submerged lands of the Gulf three leagues from shore, are not questioned by the Court. With reference to the Republic of Texas' ownership of this property, the majority opinion says:

> "We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held." 70 S. Ct. at 923.

[3] *Mr. Justice Tom Clark,* while Attorney General of the United States, testified that on the day he argued the *California* case in this Court, March 13, 1947, he handed to the press a written statement as to other States which contained these words as to Texas: ". . . Texas had been an independent nation, a republic, for ten years before joining the Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission." (Joint Hearings Before the Committees on the Judiciary,

Texas that these lands and minerals were owned by Texas in accordance with the solemn contract entered into by the two sovereigns when Texas was still an independent nation. Such has been the history taught and believed in the Texas public schools. *Not until December 21, 1948, after the property had become more valuable through development by Texas and its lessees, did executive officials of the United States change their interpretation of the annexation agreement and seek to dispossess Texas of its ownership and possession of the property.*

For many years all of the property in controversy has been dedicated solely to the Public School Fund of Texas. The loss of its revenues at this late date would seriously damage the financial structure of the State's public school system. The importance of the case to Texas and to its people cannot be overstated.[4]

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on S. 1988 and Similar House Bills, 80th Cong., 2nd Sess. (1948) 689.)

President Truman said: "Texas is in a class by itself; it entered the Union by Treaty." (Speech at Austin, Texas, September 20, 1948.)

Former Interior Secretary Harold L. Ickes said: "Parenthetically, Texas may have the legal right to its tidelands because it came into the Union voluntarily and as an independent country." (Address over ABC Network, October 14, 1948.)

[4] The adverse federal claims have been the subject of resolutions and petitions to Congress by the Texas Legislature, the State School Land Board, the State Board of Education, the Texas State Teachers Association, the State Association of Parents and Teachers, the Texas State Bar, the Texas Departments of the American Legion and Veterans of Foreign Wars, and many other statewide and local civic organizations. A statewide newspaper poll on November 27, 1949, listed it as the problem considered by the people of Texas as the most important public issue facing the State.

It is equally important to the honor of the nation, which treats its international agreements "in the highest good faith" and whose Presidents said, while negotiating with the Republic of Texas for annexation:

> "We could not with honor take the lands without assuming the full payment of all encumbrances upon them."[5]

and

> "Of course, I would maintain the Texian title to the extent which she claims it to be . . . ."[6]

The great importance of the case to Texas and the century of possession and understanding of the annexation agreement, although not controlling, have a definite bearing upon the kind of consideration and hearing which should be accorded the State in this case.

In other original actions involving issues of this magnitude, this Court, sitting as the final arbiter of fact and law, has always permitted full development

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[5] President John Tyler, Annual Message to Congress, December 3, 1844, IV Richardson, *Messages and Papers of the Presidents* (1896) 334-52. *Texas was the only State required to assume payment of its previous public indebtedness.* Hershey, *Essentials of International Public Law* (1912) 136, note 13.

[6] President James K. Polk in letter dated June 15, 1845, to Andrew Donelson, United States Chargé d'Affaires, who was negotiating the annexation agreement with Texas. The Papers of James K. Polk, vol. 72, p. 6767, MS. Library of Congress.

of the evidence at a trial on the merits.[7] The practice in such cases was stated by Chief Justice White in *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914), as follows:

> "As we have pointed out, in acting in this case from first to last *the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law*, determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of . . . *there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case.*"

In this case, despite repeated requests by Texas for an opportunity to present evidence confirming the correctness of the prior interpretation of the agree-

[7] The majority opinion in this case says: "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." 70 S. Ct. at 922. Cf. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948); *Eccles v. Peoples Bank of Lakewood, Cal.*, 333 U.S. 426, 434 (1948); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *Rhode Island v. Massachusetts*, 14 Pet. 210, 257 (1840); *Kansas v. Colorado*, 185 U.S. 125, 144, 147 (1902).

ment by both the United States and Texas, the Court has departed from its previous practice by rendering summary judgment for the United States on the pleadings alone. The opportunity to present evidence has been denied. The intention of the parties in 1845 and their contemporary and subsequent construction of the agreement have been ignored. **Judgment has been rendered solely upon the Court's present interpretation of an "equal footing" clause which was not even contained in the agreement and which, even if implied, can be shown by the evidence to have had no such meaning or effect in the minds and intentions of the parties when they made the annexation agreement in 1845.** See Point I, *infra*, pp. 8-21.

No matter how desirable "equal footing" between the States as to ownership of marginal belt lands may now seem to appear to federal officials, the controlling question is what the parties deemed advisable and agreed to in 1845. Previously, in 1844, when Texas offered all of its lands and minerals to the United States in return for the assumption of its public debt of $10,000,000, the proposal was defeated in the United States Senate partially because the lands were said to be "worthless." The counter-proposal that Texas retain all "lands lying within its limits" and pay its own debts originated in the United States Congress, not in Texas. It was accepted by Texas, and Texas became the only State to assume its previous public debt. (See note 5, *supra.*) Also, by reason of the agreement, Texas is the only State west of the Mississippi which has received no federal land grants for public education.[8]

[8] See *Statistical Abstract of the United States* (1948 ed.), Table No. 188. As shown by this list, many of the States have received from the federal government for public school purposes far more than the 2,608,774 acres here involved.

These resulting "inequalities" cannot be offset except by allowing Texas to continue in its ownership of the lands as originally agreed.

Because of these errors, hereinafter detailed, Texas urges that a rehearing should be granted in order that it may at least be heard on the evidence before final disposition of this case. The very closeness of the 4-3 decision *before any hearing* of the evidence suggests the possibility of a different result *after a full hearing.*

It is also submitted that a case of such public import should not be decided finally by a minority of the full Court without full development of the evidence. Here, only four of the nine members of the Court have concurred. (Justices Jackson and Clark not participating.) Chief Justice Marshall, when the Court was composed of seven judges, said in *City of New York v. Miln*, 8 Pet. 120, 122 (1834):

> "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four [of seven] judges concur in opinion, thus making the decision that of a majority of the whole court."

This practice would seem equally applicable to public questions of great import involving an international agreement, at least to the extent that a summary judgment should not stand when rendered by only four of the members of the Court and when the defendant State in good faith asserts that a full development of the evidence will reveal the intention of the parties, and hence the true meaning of the agreement, as being contrary to their interpretation.

There can be no "absolute necessity" of deciding the meaning of this international agreement by a minority of the whole Court without hearing the evidence.

ARGUMENT

I

The majority opinion is based on an error of historical fact.

The Court erred in denying Texas the right to introduce evidence and in rendering judgment for plaintiff on the ground that a relinquishment of the property in question was effected by the "equal footing" provision of Section 3 of the annexation resolution, because Section 3 and "equal footing" were never submitted to nor accepted by the Republic of Texas and formed no part of the annexation agreement.

The Court holds that an "equal footing" clause in Section 3 of the annexation proposal of March 1, 1845, effected a relinquishment to the United States of the 2,608,774 acres of land and minerals within Texas' original boundaries. **In so doing, the majority has based its opinion on a grievous error of fact and history.** Section 3, the only provision of the annexation resolution containing an "equal footing" clause, was an alternative method of annexation which was *never submitted* to Texas by the President of the United States and was *never considered or accepted as a part of the annexation agreement.*

Only Sections 1 and 2, which specifically provided for Texas' retention of "lands lying within its limits"[9] and which purposely contained no "equal foot-

[9] 5 Stat. 797.

ing" clause, were submitted and agreed upon between the United States and Texas.

Plaintiff's brief clearly recognizes that if the parties actually intended this retention to be as broad as it is written and, therefore, that Texas should retain the lands and minerals now in controversy within its original boundaries, there are no other terms in the agreement which would defeat this intention. Plaintiff argued that the property passed to the United States with the transfer of national sovereignty, but *only if the retention clause did not include the lands in question.*[10]

In spite of this frank position assumed by plaintiff, the Court has disposed of the case on a ground not suggested by plaintiff, and one which gives no consideration to the retention clause or to the intention of the contracting parties.

Quoting from the discarded Section 3, the majority opinion states that Texas was admitted to the Union in 1845 "on an equal footing with the existing states" under the "Joint Resolution approved March 1, 1845, 5 Stat. 797" (70 S. Ct. at 921), and that

> "We are of the view that the 'equal footing' clause of the Joint Resolution annexing Texas to the Union disposes of the present phase of this controversy." (70 S. Ct. at 922.)

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[10] All of plaintiff's arguments as to the irrelevance of Texas' former status as an independent nation and the effect of transfer of national sovereignty and "equal footing," Point II, B (Plaintiff's Brief, pp. 52-63), are conditioned upon the assumption that the retention clause is inapplicable to the lands in controversy. In note 28, p. 54, of plaintiff's brief, it is said:

> "We assume throughout Point II, B, that the 'vacant and unappropriated lands' clause is inapplicable for any or all of the reasons given in Point II, A."

In its final form this "Joint Resolution for Annexing Texas" (5 Stat. 797) embraced two entirely different bases and plans of annexation. Sections 1 and 2 provided:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the state of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the states of this Union.

"2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to-wit: *First*—said state to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second*—said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other

property and means pertaining to the public defence belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. . . ." (The remainder of Section 2 related to the division of Texas into four additional States, slavery, etc. Equal footing is not mentioned.)

Section 3 provided an alternative and basically different plan as follows:

"3. And be it further resolved, That if the President of the United States shall in his judgment and discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then, Be it resolved, that a state, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing states, as soon as the terms and conditions of such admission, and the cession of the remaining Texan territory to the United

States shall be agreed upon by the governments of Texas and the United States: And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two Houses of Congress, as the President may direct." (Italics supplied to distinguish discarded section. The underlined words are those quoted and relied upon by the majority opinion.)

Only Sections 1 and 2 of this resolution, which did not contain the "equal footing" clause but contained specific terms for the admission of Texas, were presented to Texas "as the basis of its admission."[11] The alternative method contained in Section 3 was deliberately discarded by both Presidents Tyler and Polk.[12]

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[11] 1 Senate Docs., 29th Cong., 1st sess., No. 1, pp. 32, 35, 48-49, 54, 85, 98; 1 House Docs., 29th Cong., 1st sess., No. 2, pp. 125-126, 127-128, 34-35, 41-42, 76, 86.

[12] Hunter Miller, in *Treaties and Other International Acts of the United States*, published by the Department of State (1934), describes the Presidential actions as follows:

"The term of President Tyler was about to expire; but he decided to act at once, and to act under sections 1 and 2 of the joint resolution (see Tyler, Letters and Times of the Tylers, II, 364-65); and the following instructions were sent to Andrew Jackson Donelson, Chargé d'Affaires to Texas . . . under date of March 3, 1845:

" 'I herewith transmit to you a copy of the Joint Resolutions adopted by Congress for the annexation of Texas to the United States.

" 'You will perceive that they consist of two distinct parts; the one embraced in the first and second sections, being the original Resolution as it passed the House of Representatives; the other, included in

This fact was expressly recognized in the brief of the United States[13] and is made clear in the acts of

the third and last, being the amendment made by the Senate and subsequently adopted by the House. The former contains certain specific propositions for the admission of Texas into our Union; the latter gives a discretionary power to the President, if he should deem it advisable, to enter into negotiations with the Republic, as prescribed in the section itself, instead of submitting to its acceptance or rejection the proposals contained in the former.

"'The President has deliberately considered the subject, and is of opinion that it would not be advisable to enter into the negotiations authorized by the amendment of the Senate, and you are accordingly instructed to present to the government of Texas as the basis of its admission, the proposals contained in the Resolution as it came from the House of Representatives.'" (Vol. 4, pp. 706-07.)

"President Polk adopted the decision of his predecessor; the instructions to Donelson signed by Secretary of State Buchanan on March 10, 1845 . . . differed somewhat in their reasoning from those of March 3, 1845, but were to the same effect:

"'You will have received, ere this can reach you, the despatch of Mr. Calhoun, the late Secretary of State, of the third instant, instructing you "to present to the government of Texas, as the basis of its admission, the proposals contained in the Resolution as it came from the House of Representatives." President Tyler having thus determined to adopt the two first of the series of Resolutions instead of the alternative presented by the third, it became the duty of the President to devote his attention to this important question at as early a moment as possible. This has been done, and his deliberations have resulted in a clear and firm conviction that it would be inexpedient to reverse the decision of his predecessor.'" (Vol. 4, p. 708.)

[13] At p. 9, note 4, it was said: "The third section of the Joint Resolution gave the President the option to negotiate with the Republic of Texas for annexation on different terms. The President did not take advantage of that option, but submitted to the Republic the specific terms contained in the first two sections of the Joint Resolution."

acceptance by Texas and the subsequent action of the United States.

In the Joint Resolution of the Congress of Texas accepting the annexation proposal submitted by Presidents Tyler and Polk, June 23, 1845, 2 Gammel's Laws of Texas 1225, it was provided in the preamble:

> "Whereas, the Government of the United States hath proposed the following *terms, guarantees, and conditions*, on which the people and Territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to-wit:
>
> "[*Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except Section 3.*]"

It was resolved that

> "... said consent is given on the terms, guarantees, and conditions set forth in the Preamble to this Joint Resolution."

There was no "equal footing" provision in this resolution.

The Ordinance of the Convention of Texas, July 4, 1845, 2 Gammel's Laws of Texas 1228, giving consent of the people of Texas to the annexation agreement, was in part as follows:

> ". . . *whereas the President of the United States has submitted to Texas the first and second sections of the said resolution* [of March 1, 1845], *as the basis upon which Texas may be admitted* as one of the States of the said Union;

and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

"[*Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except Section 3.*]

"Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; We the deputies of the people of Texas in convention assembled, in their name and by their authority, do ordain and declare, that *we assent to, and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.*"

There was no "equal footing" provision in this ordinance nor in the constitution drafted by the same convention "in accordance with the provisions of the Joint Resolution for annexing Texas to the United States." Instead, this constitution specifically provided:

"The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas, . . . shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20, Constitution of Texas, 1845.)

This constitution was approved by the Congress of the United States on December 29, 1845 (9 Stat.

108), as being "in conformity to the provisions of said Joint Resolution [March 1, 1845]," which were by the same act recognized to be "the proposals, conditions, and guarantees contained in said first and second sections of said resolution."

It is clear, therefore, that the majority opinion is erroneously based on a clause which was not included in, but was purposely omitted from, the annexation agreement between the United States and Texas. No "equal footing" provision, whether with or without the meaning now applied to the term by the Court, was presented to or agreed upon by Texas at any stage of the annexation procedure or as any part of the "terms, guarantees, and conditions" of its agreement with the United States.

The only mention of "equal footing" in the entire procedure was a unilateral inclusion of the term by the United States Congress in the final act of admission on December 29, 1845. (9 Stat. 108.) As said by President Polk, and as the evidence will clearly show, this act was a mere formality.[14] It was not

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[14] In a letter to General Sam Houston, dated June 6, 1845, President Polk wrote:

> "If she [Texas] accepts unconditionally, the great measure of the re-union of the two countries will be placed beyond danger and *may be regarded as consummated, for the next session of Congress as a matter of course* will redeem the National faith and admit her into our Union."

On June 15, 1845, President Polk wrote Andrew Donelson, United States Chargé d'Affaires, who was negotiating the agreement:

> ". . . the conventions of Texas should on the day they meet pass a general resolution accepting our terms of annexation. The moment they do this I shall regard Texas as a part of our Union . . . ."

submitted to the Congress or to the people of Texas, and it was not intended to and could not alter the terms and conditions of annexation theretofore specifically agreed upon by joint action of the Congress of the United States, the Congress of Texas, and the people of Texas in convention assembled.

Indeed, the Court has attached no significance to this clause in the formal admission resolution of December 29, 1845. It was not even referred to in the majority opinion. The Court, of course, perceived that under the plan that was actually submitted to Texas, consummation of the agreement was not made contingent upon future consent of the Congress of the United States. After declaring, as it did, in the Joint Resolution approved December 29, 1845, that Texas had fully satisfied the terms and conditions entitling her to be admitted as a State pursuant to the Joint Resolution approved March 1, 1845, Congress was powerless to change or add to the agreement by this unilaterial *post factum*.

Nor did the Congress of the United States purport to change the agreement by the resolution of December 29, 1845. The preamble to the formal resolution of December 29, 1845, recites that the "consent of Congress was given upon certain conditions specified in the first and second sections of said Joint Resolution [of March 1, 1845]", and that "the people of the said Republic of Texas . . . assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution. . . ." Thus, it was recognized by the resolution itself that by this process of offer and acceptance a binding agreement had

been previously concluded, and the formal admission was in accordance with that agreement.

To say that this general "equal footing" clause inserted by the United States Congress in the formal act of admission was intended to nullify the specific agreement already made with respect to all lands lying within its limits would thus be contrary to the express intention of the parties and also would violate established rules of construction.[15]

The Court has not said whether, aside from "equal footing," the Court agrees or disagrees with defendant's interpretation of the annexation agreement. But the Court's opinion does say, in effect, that if "equal footing" were absent from the Joint Resolution approved March 1, 1845, "introduction of evidence and a full hearing would be essential."

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[15] Established principles in the interpretation of treaties and other international agreements are:

(1) "the intention of the parties is to be determined by a consideration of the whole instrument, not by viewing the stipulations separately" (Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916) 317; *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); *United States v. Texas*, 162 U.S. 1, 36 (1896).

(2) in case of a conflict between different provisions of the same treaty or agreement, that which is specifically stated prevails over the more general statement (Hershey, *Essentials of International Public Law* (1919) 315-17; Woolsey, *International Law* (6th ed. 1892) 173-74);

(3) "no treaty should be construed as intended to divest rights of property . . . unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question" (*United States v. Minnesota*, 270 U.S. 181, 209 (1926); Glenn, *International Law* (1895) 144-46; Taylor, *International Public Law* (1901) 397, § 385; and

(4) treaties are regarded by this Court as international compacts to be faithfully observed by the United States and are to be construed "in the highest good faith in so far as the other party is concerned" (Lenoir, "Treaties and the Supreme Court," 1 U. of Chi. L. Rev. 602, 617 (1934); Crandall, *Treaties, Their Making and Enforcement* 401). See also pp. 31-34, *infra*.

Since, from the foregoing, it is beyond dispute that "equal footing" was not mentioned in the negotiations and agreement concluded with the Republic of Texas in accordance with Sections 1 and 2 of the Joint Resolution approved March 1, 1845, defendant respectfully but earnestly insists that rehearing should be granted and "full development of the facts" should be allowed.

Even if this "equal footing" clause were a part of the agreement, the meaning or effect of the term should be determined in the light of what the parties at that time understood as the meaning of the term. *Strother v. Lucas*, 12 Pet. 410, 438, 446 (1838); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); Fenwick, *International Law* (3rd ed. 1948) 444; Miller, "Preparatory Work in the Interpretation of Treaties," 17 Iowa L. Rev. 206, 213 (1931).

The State has an abundance of evidence from Congressional Records, correspondence, and speeches, which conclusively shows that in 1845 the members of both the United States and Texas Congresses *then believed* that new States would own all lands beneath navigable waters within their boundaries, inland and coastal, even without express grant or retention, under the then existing concept of State sovereignty and "equal footing." It should be remembered that several State court decisions and two Supreme Court decisions had previously stated Congress' 1845 belief as the law. As early as 1842 in *Martin v. Waddell*, 16 Pet. 367, 410, this Court said:

> ". . . when the revolution took place, the people of each State became themselves sovereign;

> and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The rule had been announced again by the Supreme Court in 1845 in the case of *Pollard v. Hagan*, 3 How. 212, 230, as follows:

> "First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."

The understanding and belief as to the law on this subject in 1845[18a] is forcibly shown by the following language of this Court in the *California* case:

> "As previously stated this Court has followed and reasserted the *basic doctrine of the Pollard case* many times. And in doing so it has used language strong enough to indicate that the Court *then believed that States* not only owned tidelands and soil under navigable inland waters, but also *owned soils under all navigable*

[18a] The *Pollard* case was decided by this Court on February 18, 1845, while the debate on annexation was in progress in the Congress.

waters within their territorial jurisdiction, whether inland or not." (332 U. S. at 36.)

The majority opinion says "there is no need to take evidence to establish that meaning of 'equal footing' " which is understood by the Court today. But the Court's understanding of the current meaning of "equal footing" is not the criterion. The question is the understanding and intention of the parties as to the meaning of that term in 1845. If given the opportunity, Texas will present evidence which will show that the minds of the contracting parties never met on the meaning or effect of "equal footing" as those words are now interpreted and applied by the Court to the lands and minerals in controversy. On the contrary, it will show that their understanding, meaning, and intention were in complete harmony with the specific retention of these lands and minerals by Texas.

Even if viewed in the light most favorable to plaintiff, this case presents a dispute as to the meaning of the documents and the intention of the contracting parties, the answer to which is to be found in diplomatic correspondence, contemporary and subsequent construction, usage, international law, and the like. In such cases the majority opinion clearly states that "introduction of evidence and a full hearing would be essential." (70 S. Ct. at 922.)

The Court has erred in rendering summary judgment for the plaintiff and thereby denying Texas a trial on the merits. Rehearing should be granted in order that introduction of evidence and a full hearing may be had.

II

The Court erred in ignoring and refusing to hear evidence on that part of the annexation agreement which provided that Texas was to retain "all vacant and unappropriated lands lying within its limits."

As pointed out under the preceding point, the United States recognizes in its brief that if the property in question was included within, or intended to be included within, the specific clause that Texas retain all unsold lands "lying within its limits," it is not entitled to judgment.

In its brief, plaintiff devoted 30 pages of its 61 pages of argument to an attempt to show that this property was not intended to be included within the retention clause.[16] The next 11 pages were devoted to an argument that the transfer of this property is evidenced by the transfer of national sovereignty and by alleged "equal footing."[17] *However, the conclusion sought by this entire argument was frankly admitted to be proper only if the Court finds that the retention clause was inapplicable to this property.*[18] The remainder of plaintiff's argument (pp. 63-80) deals with prescription (Point II, C), a "résumé" of previous arguments (Point II, D), and that portion of the continental shelf outside of the original boundaries of Texas (Point III).

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[16] See Plaintiff's Brief in Support of Motion for Judgment, Point II, A, pp. 22-52.

[17] Point II, B, *id.* at pp. 52-63.

[18] In this connection plaintiff said: "We assume, throughout Point II, B, that the 'vacant and unappropriated lands' clause is inapplicable for any or all of the reasons given in Point II, A, *supra*." (Note 28, *id.* at p. 54.)

Nowhere in its brief does plaintiff contend that any provision of the Constitution or the annexation agreement prevents State ownership of these lands and minerals if in fact the parties so intended by agreeing to Texas' retention of the unsold "lands lying within its limits."[19]

This Court, in the *California* case, recognized that ownership of this type of property is not a necessary incident of national sovereignty or essential to the exercise of federal constitutional powers over the area when it said that the power of Congress to deal with such property "is without limitation." The Court added, "Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power."[20]

Implicit in the powers of the United States Congress to convey such lands and minerals to other

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[19] In the Government's brief in *United States v. California*, 332 U.S. 19 (1947), it was said:

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea." (p. 89.)

[20] *United States v. California*, 332 U.S. 19, 27. Again, after stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court said: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.* at 40.

States[21] and to good faith claimants,[22] and to admit new States,[23] is the power to admit Texas to the Union under an agreement that Texas retain the lands and minerals in the first instance.

Therefore, the nature of this property, its subordination to paramount political powers, "equal footing," and transfer of national sovereignty are wholly irrelevant if the parties did in fact specifically agree that Texas retain the lands and minerals within its Gulfward limits three leagues from shore.

This being true, the meaning and effect of the retention clause is, as recognized by plaintiff's brief, a controlling issue in this case. The Court has erred in failing to consider the clause, its meaning, and the intention of the parties agreeing thereto.

In its amended answer and brief, Texas urged as a matter of law, and also as a matter of fact based on the intention of the parties, that the submerged lands within its original boundaries were included within the retention by Texas of all "lands lying within its limits."[24]

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[21] Solicitor General Perlman, in answer to a question by Mr. Justice Reed during the argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh, yes, Congress could give whatever title it has, whatever rights it has, to the states." Argument, *United States v. Texas*, March 28, 1949, Reporter's Transcript, p. 6.

[22] *United States v. California*, 332 U.S. 19, 40; see note 20, *supra*.

[23] Constitution of the United States, Art. IV, Sec. 3.

[24] First Amended Answer of the State of Texas, p. 15, wherein it was alleged:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the

As a matter of law, Texas made these arguments which have not been disposed of by the Court:

1. Ownership of the lands and minerals within its original Gulfward limits,[25] being a proprietary right under the domestic law of the Republic of Texas, remained in the State of Texas, because this ownership was not expressly ceded to the United States.[26] See *Attorney General of Canada v. Attorney General of Ontario*, [1898] A. C. 700, 709-10, in which was presented the question of whether proprietary rights of the Canadian provinces in lands beneath territorial waters passed with national political powers to the Dominion of Canada. The Court said:

> "Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

Vattel says that in interpreting agreements of this nature,

> "Whatever tends to change the present state of things is also to be ranked in the class of odious things: for the proprietor cannot be deprived of his right, except so far, precisely, as

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two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic. . . ." See also Texas' Brief in Opposition to Motion for Judgment, pp. 136-192.

[25] These limits, "three leagues" from shore, are not questioned by the Court. See notes 1 and 2, *supra*.

[26] Texas' Brief, pp. 143-152.

he relinquishes it on his part; and in case of doubt, the presumption is in favour of the possessor."[27]

2. The marginal belt lands and minerals within Texas' original boundaries were included within and retained by the specific clause agreed upon by the United States and Texas that "said state, when admitted into the Union . . . shall also retain all the vacant and unappropriated lands *lying within its limits*. . . ." (See argument and authorities submitted in Texas' Brief, pp. 153-62.)

3. The title to mineral lands, all of which were owned in separate estate by the Republic throughout the limits of its territory and held in trust for the people,[28] did not pass with national sovereignty but remained in the State. *United States v. Castillero*, 2 Black 17 (1862); *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861). In the latter opinion by Mr. Justice Field, then Chief Justice of the Supreme Court of California, it was said:

> "*Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale.* Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed

[27] Vattel, *The Law of Nations* (Chitty's 1st ed. 1834) 265.

[28] Texas' Brief, pp. 113-24; Appendix, pp. 68-107.

> the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. . . . *The minerals do not differ from the great mass of property*, the *ownership* of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but *when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.*" (pp. 218-19.)

Under the mineral laws of the Republic of Texas, the separate mineral estate did not pass except by express grant. This special and separate mineral ownership by the Republic of Texas was known to and considered by the United States Congress. A provision for cession of the mines and minerals to the United States was stricken from the draft of the annexation resolution.[29] They were intended to be retained by the State of Texas, as evidenced by their omission from the cession and by the retention of "all vacant and unappropriated lands lying within its limits." Although separate from the ownership of the soil, a general retention of "lands" includes separate mineral estates. *United States v. Castillero*, 2 Black 17 (1862).

4. The marginal belt lands and minerals lying within the boundaries of the Republic of Texas were rights of property held by the Republic in trust for

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[29] See specific congressional action outlined in Texas' Brief, pp. 151-152.

the people[29a] and were therefore included within the following provision of the Constitution of the new State adopted as part of the annexation procedure:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[30]

This Constitution was laid before the United States Congress and was approved by that body in the final Act of Admission as being "in conformity to the provisions" of the annexation resolution. 9 Stat. 108.

In view of the foregoing matters of law, the Court erred in granting plaintiff's motion for judgment with respect to the lands and minerals lying within the limits of the original Gulfward boundaries of the Republic of Texas three leagues from shore.

If, after considering these matters of law, there remains any doubt as to the meaning of the documents and the intention of the parties with reference to the retention of these lands or minerals by Texas, the Court should hear the evidence bearing on this meaning and intention before resolving the doubt.

The evidence in Texas' possession will show that the Republic of Texas owned, used, and had knowledge of the value of the 2,608,774 acres of submerged lands and minerals within its three-league

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[29a] *City of Galveston v. Menard*, 23 Tex. 349 (1859).

[30] Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

Gulfward boundary;[31] that the representatives of the United States and Texas intended the retention by Texas of unsold "lands lying within its limits" to be as broad as it appears and to include all lands within the Gulfward boundary of the Republic, not simply those above low-water mark as plaintiff contends; that the parties intended and provided no present cession of property by the annexation agreement, it being agreed that *only after the State was admitted into the Union was any property to be ceded*, and then only the specifically listed property *then pertaining* to the public defense; that after admission to the Union, all property of this nature was inventoried by officials of both the United States and Texas and was expressly conveyed by the State of Texas and accepted by the United States as full compliance with the agreement; that no other property was asked for or intended to be transferred; that none of the inventories or conveyances included the property in controversy; that during 103 years of subsequent construction both the United States and Texas have recognized that it was intended for the State of Texas to retain the ownership of the lands and minerals within its three-league Gulfward boundary; and that customs, usages, and practices of nations in 1845 fully support the above meaning and effect of the international agreement between Texas and the United States. (See summary of available evi-

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[31] The majority opinion does not question this. In this connection it says: "We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held." 70 S. Ct. at 923.

dence of international practice in Joint Memorandum appended hereto at p. 54.)

For over two years, counsel for Texas, at great expense to the State, have been gathering letters, diplomatic correspondence, newspaper files, maps, and other documents from the National Archives, Texas Archives, and other official and private sources, relevant to the above meaning and interpretation. Texas has an abundance of evidence and testimony bearing upon the intention of the parties and their contemporary and subsequent interpretation that the State retained all proprietary rights to the lands and minerals in controversy. These subsequent interpretations include letters and opinions of the Attorney General of the United States, the Department of State, and the Secretary of the Interior, as well as of the parties who actually negotiated the agreement on behalf of the two nations. Defendant is prepared to prove that the parties who negotiated this agreement in 1845 believed at that time that these and all other submerged lands within State boundaries were owned by the respective States even without being mentioned in a retention or granting clause. Letters, speeches, and other documents will show that no one at the time made any contention that these lands would not belong to the new State. The understanding of the parties at that time must be given controlling effect as to whether they meant what they said, or had something else in mind, when they agreed that Texas should retain all of the unsold lands "lying within its limits."

The Court recognizes that.

> "If there were a dispute as to the meaning of documents and the answer was to be found in the diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential." (70 S. Ct. at 922.)

That there is a dispute as to the meaning of documents seems fairly obvious from the pleadings and briefs of plaintiff and defendant, as well as from the fact that the Court itself divided 4-3 on the question of what was intended by the annexation agreement.

"At least," says Mr. Justice Reed, joined by Mr. Justice Minton, "we should permit evidence of its meaning." 70 S. Ct. at 926. Mr. Justice Frankfurter says that

> " . . . the submerged lands now in controversy were part of the domain of Texas when she was on her own. The Court now decides that when Texas entered the Union she lost what she had and the United States acquired it. How that shift came to pass remains for me a puzzle." 70 S. Ct. at 927.

If there is any doubt as to the meaning of the disputed documents in question, the answer should be ascertained from "the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it." *Factor v. Laubenheimer*, 290 U.S.

276, 294-95 (1933).[22] It has been said in this connection that

> ". . . in order to ascertain the clear intent of the parties to a legal writing, whether it be a will, a contract, a statute, or an international agreement, recourse should be had to all extrinsic evidence which may aid the interpreter. It is not enough even that the text should be 'intelligible,' that its meaning should seem 'sufficiently clear.' The interpreter is bound to seek to discover the meaning of the terms used as understood by the negotiators and contracting parties. Such meaning is obviously not 'sufficiently clear' until he is certain that it embodies their intent. . . .
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> "In the case of international agreements this necessity would appear all the more urgent. The moment that a nation challenges the correctness of an interpretation of its commitments under a treaty it would seem in accordance with the dictates of reason, of equity, and of prudence to ascertain the grounds for its position. *The interpreter may not properly ignore any evidence which may be adduced, whether of protocols of conferences, memoranda of discussions, diplomatic correspondence, or even of personal declarations by the negotiators, as well as statements by authorities competent to ratify negotiated instruments. The intent and the clear understanding of that intent, whether by one or*

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[22] *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *Nielsen v. Johnson*, 279 U. S. 47, 52 (1929); *Ross v. McIntyre*, 140 U. S. 453, 475 (1891); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923); *United States v. Texas*, 162 U.S. 1, 23 (1896); *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 158 (1934).

all the parties concerned, is everything. If there be any doubt on the subject, that doubt must be removed before justice can be accorded."[33]

Yu, in *The Interpretation of Treaties* (1927), says:

> "So far as the standard of an international agreement is a mutual standard of more than one party to a bilateral act, it seems necessary for those charged with the task of interpretation to exhaust all evidence from the prior and subsequent utterances of the parties so as to ascertain their fixed associations with the standards used." (p. 46.)
>
> "The essence of the principle of interpretation, therefore, is to ascertain through all sources of evidence what is the standard agreed upon, namely, what is the sense which the contracting parties mutually attached to the terms of the agreement." (pp. 136-37.)

Charles Cheney Hyde in volume 2 of his work, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945), says:

> "Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal charged with the duty of interpretation." (p. 1471.)

Discussing the practice of this Court, Hyde says:

> "In a word, the conclusions of the Court as to the designs of contracting States have been ex-

[33] Phillip Marshall Brown, "The Interpretation of Treaties," 23 Am. J. Int. L. 819, 822 (1929).

pressed in terms revealing deference for what the evidence established rather than for any other consideration. . . .

"The Supreme Court is not disposed to forbid recourse to, or to decline itself to rely upon, diplomatic exchanges or correspondence indicating the views of negotiators of a treaty, of which the interpretation is uncertain. *The fact of uncertainty is seemingly regarded as made apparent by the divergency of views of opposing litigants, notwithstanding the form of the text.* The Court has not sought to postpone consideration of such evidence until, after exhausting other modes or processes of interpretation, it still remains itself in doubt." (pp. 1481-82.)

Defendant respectfully submits that rehearing should be granted in order that evidence may be presented to show the intention of the parties in their international agreement which contained no cession of the lands and minerals in question but expressly provided that Texas should retain all unsold lands "lying within its limits."

III

Full development of the evidence will show that Texas' retention of the lands and minerals in its marginal belt was and is in accord with, rather than in conflict with, rules of international and domestic law applicable to this type of property.

As heretofore shown, a controlling fact question in this case is: *Did the parties to the annexation agreement of 1845 intend that Texas was to retain the lands and minerals underlying the marginal belt within its three-league Gulfward boundaries?*

If given the opportunity, Texas is prepared to present evidence in support of an affirmative answer to this question. The nature of much of this evidence has been discussed under the previous points. In addition, there is other evidence as to the following matters which is pertinent in determining the intention of the parties in 1845 and which will support Texas' position in this case:

(1) the rules of international law in 1845 applicable to the act of union and the type of property in question;

(2) the domestic law of both nations in 1845 in so far as it was applicable or believed to be applicable to the disputed property;

(3) the actual nature of the subordinate economic use and possession of the property (ownership) as distinguished from paramount political powers of sovereignty (*imperium*).

The Court has made conclusions of law and mixed conclusions of fact and law concerning these matters without hearing the evidence which Texas insists would require different conclusions.

The Court recognizes that "equal footing" generally does not apply to property or "economic stature or standing." 70 S. Ct. at 992. However, it applied the discarded "equal footing" clause to the property in question because of its erroneous conclusions that "once low-water mark is passed the international domain is reached" and therefore that "property rights must then be so subordinated to political rights as in substance to coalesce and unite in

the national sovereign." It has been shown that there was no "equal footing" provision in the annexation agreement, and that even if such a provision is implied, there is abundant evidence of a positive character to show that the parties did not intend the meaning and interpretation which the Court now attaches thereto with respect to this property. (*Supra*, pp. 8-21.)

In addition, a thorough examination of the evidence on the points above indicated will show that the property was a part of the national domain of the Republic of Texas and subject to its property laws the same as all of its territory; that it was not then and is not now a part of "the international domain"; that the rights of ownership and economic benefit were and are proprietary in nature and in fact, and were and are severable and separate from political powers of sovereignty; and therefore that an "equal footing" provision would not have the effect of transferring title to the new national sovereign even if there were such a provision in the agreement.

The evidence which Texas asks an opportunity to present on international law, domestic law, and the actual nature of ownership as distinguished from sovereignty, may be summarized as follows:

International Law

a. *Territorial and proprietary status of marginal belt lands and minerals:* According to international law (customs, usages, and practices of nations) in 1845 and since that time, the marginal belt within a nation's seaward boundaries was and is considered an integral part of its territory the same as its

lands above low-water mark.[34] The original proprietor acquired full sovereignty (*imperium*) and ownership (*dominium*), subject only to the right of "innocent passage" in the waters.[35] Under international law these rights of *dominium* and *imperium* were and are separate and severable, since there are no international duties and responsibilities which require ownership of the subsoil and minerals by the national sovereign rather than by one of its component States, political subdivisions.[36] Of course, such ownership is always subject to paramount regulatory powers designed to protect the public use of the waters, national security, commerce, and innocent passage.[37]

In view of the foregoing, the Court erred in its conclusion that "once low-water mark is passed the

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[34] Wheaton says: "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." Wheaton, *Elements of International Law* (1836) 142-143.

[35] See complete agreement of publicists on this point since 1670 compiled in Texas' Brief, appendix, pp. 18-50; also Joint Memorandum of experts appended at p. 54, *infra*.

[36] This view was expressed by the Department of State when asked by the Senate Judiciary Committee for its comment on a pending bill confirming State ownership of these marginal belt lands. The reply was:

"As this matter appears to relate primarily to a domestic question of the respective extent of State and Federal rights, and does not appear to any large extent to fall within the purvue of the activities of this Department, I suggest that other agencies of the Government (for example, the Department of Justice and the Treasury Department) are in a better position to furnish helpful suggestions with respect to the joint resolution." Joint Hearings Before the House Judiciary Committee and a Special Subcommittee of the Senate Judiciary Committee, 79th Cong., 1st Sess. (1945) 20.

[37] Gidel has pointed out that the right of innocent passage is not an absolute right of foreign nations to object to the construction by a littoral nation of *any* obstruction

international domain is reached." 70 S. Ct. at 924. Concerning these words of the Court, Gilbert Gidel, one of the world's foremost authorities on the law of the marginal sea,[38] has written and will testify as an expert:

> "These words show that the distinction between the territorial or marginal sea and the high sea has been completely lost sight of by the Court. Such a statement is in complete opposition to the international law of the territorial sea not only as it is described by all the authors but also as it was manifested by the unanimity of nations represented at the conference for the codification of international law at The Hague in 1930.[39] The marginal sea

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to navigation in the marginal sea but rather a right to complain *only* if the obstruction is erected for the *sole* purpose of denying use of the area to foreign merchant ships in innocent passage. 3 Gidel, *Le droit international public de la mer* (Paris, 1934) 328-329, 331-332. A national sovereign's responsibilities in this regard may be discharged without ownership of the sea-bed and subsoil. See Joint Memorandum, pp. 60 and 64, *infra*.

[38] Author of *Le droit international public de la mer* (The Public International Law of the Sea) (Paris, 1932-1934), 3 vols., the most comprehensive work in existence on the subject. Gidel is President of the Curatorium of the Academy of International Law at The Hague and represented France at the 1930 Hague conference for the Codification of the Law of Territorial Waters.

[39] The official view of the United States as expressed by the Department of State at this conference was:

> "The sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the *property* of the United States or of the individual States where they border." Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, Vol. II—Territorial Waters. Doc. No. C. 74.M.39.1929.V. p. 128.

> comprises a part, as have proclaimed the texts established at this conference, not of the 'international domain,' but on the contrary of the territory of the riparian owner. The 'international domain' begins only at that point where the high sea begins (beyond the marginal sea and beginning at its line of departure).
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> "Thus to argue for a claimed inclusion of the territorial sea in the 'international domain' in order to infer the subordination of property rights to political rights 'as in substance to coalesce and unite in the national sovereign' is to commit an evident paralogism."

The sea bed and subsoil of the marginal sea being a part of the territory of a littoral state in and since 1845 and not a part of the "international domain," the domestic law of the Republic of Texas prior to annexation, and of the United States and the State of Texas since annexation, governs the rights in the area. Other nations have no rights or claims therein. There is no more possibility that "the very oil about which the state and nation here contend might become the subject of international dispute and settlement" (70 S. Ct. at 924) than that the oil beneath the inland waters and uplands within the territory of the United States may give rise to similar disputes—that is, unless this Court insists on its theory that the marginal sea within Texas' original boundaries is "international domain" and as such is shared in ownership by the family of nations.[40]

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[40] The theory of ownership by the family of nations within territorial waters up to low-water mark has been espoused since 1939 by Congressman Sam Hobbs of Alabama, but has

b. *Effect of the absence of express cession:* Under international law as it existed in 1845, where, in a voluntary act of union between independent nations, there was no general cession of all territory, the marginal belt lands and minerals of the annexed nation did not pass with national sovereignty to the annexing nation. The rights of ownership in these lands and minerals, being proprietary rights as distinguished from political rights, passed only by express cession.[41]

c. *Rule of appurtenance:* Under international law as it existed in 1845, the marginal sea with its sea bed and subsoil was treated as appurtenant to the adjacent uplands. Therefore, it would pass with the adjacent uplands in the case of an outright cession of territory from one nation to another.[42] However, when a nation joined an existing federal state and retained its sovereign right to hold and dispose of all unoccupied lands within its borders, under the

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never been accepted by Congress, the Department of State, the Attorney General, or any recognized authority on international law. Hearings before the Committee on Public Lands and Surveys on S. J. R. 83 and S. J. R. 92, 76th Cong., 1st Sess. (1939) 16; Hearings before the Committee on Interior and Insular Affairs on S. 155, S. 923, S. 1545, S. 1700, and S. 2153, 81st Cong., 1st Sess. (1949) 452.

[41] Vattel, *The Law of Nations* (Chitty's 1st ed. 1834) 265; *Attorney General of Canada v. Attorney General of Ontario*, [1898] A.C. 700, 709-710. See Joint Memorandum, p. 54, *infra*.

[42] *The Grisbadarna Case* in Scott, *The Hague Court Reports* (New York 1916) 12, 127. (The cession in this case occurred in 1658).

rule of appurtenance it also retained its marginal belt lands."[43]

Nature of Evidence

These foregoing points and the type of supporting evidence as to the customs, usages, and practices of nations in 1845 are summarized by ten of the world's leading experts in the fields of international law and jurisprudence in a joint memorandum attached hereto at pp. 54-69. It has been the practice of this and other courts to hear the testimony and evidence accumulated by such authorities on questions of international law and practices of nations. In *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920), a controversy as to the ownership of a riverbed in which the status of international law as of the years 1819, 1828, and 1838 was pertinent, this Court ordered that evidence be taken

> ". . . in respect to the governmental practice on the part of all governments and states concerned at the time, bearing upon the construction and effect of the said treaty."

Such a procedure is equally necessary and appropriate in this case.

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[43] Oppenheim states the rule as follows:

"The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of land, they cannot be ceded without a piece of land." 1 Oppenheim, *International Law* (7th ed. Lauterpacht, 1948) 499-500, § 215.

Domestic Law

a. *The Republic of Texas:* The majority opinion does not question Texas' original title and its distinction from sovereignty under the domestic law of the Republic of Texas. In this connection, the majority opinion says:

> "We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims." (70 S. Ct. at 923.)

The domestic law of the Republic of Texas was in accord with the international law as to the distinction and severability between ownership (economic use) of this property and governmental powers of sovereignty over it. This domestic law was the common law, adopted as to all of the property except the minerals.[44] As to the minerals, the Republic retained the Mexican civil law of ownership in trust for the people separate from the soil and sovereignty. Under this mineral law the separate mineral estate did not

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[44] Under the common law the bed and subsoil of the marginal belt was severable from sovereignty even to the extent of permitting prescription by, and conveyances to, individuals, subject to non-interference with public use and sovereign powers over the waters. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894); *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139 (Sup. Ct. of Judicature, Chan. Div.). See note 36, *supra*.

pass with the soil or with sovereignty or by any means except express conveyance."

It is pertinent to examine the foregoing status of property ownership under the domestic law of Texas before it joined the Union in order to determine whether and to what extent the act of union was intended to alter this pre-existing status. Here the answer is clear from the Constitution of Texas which was approved by the United States Congress as being "in conformity to the provisions" of the annexation resolution. (See pp. 15-16, *supra*.) It provided:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20.)[46]
>
> "All laws and parts of laws in force in the Republic of Texas . . . shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof." (Article XIII, Section 2.)[47]

Defendant has many records, maps, letters, and other evidence which will show that the Republic of Texas claimed and used the lands and minerals in question, that it had knowledge of their value and economic uses and treated them separate and apart from governmental powers, and that the intention of

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[46] Texas Brief 113-24; *United States v. Castillero*, 2 Black 17 (1862); *Moore v. Smaw*, 17 Cal. 199 (1861).

[47] 2 Gammel's Laws of Texas 1293-94.

[47] *Id.* at 1299.

the parties to the annexation agreement was not to cede but to retain this property.

b. *The United States*: As heretofore shown, the United States did not and does not now claim that of this property ownership (as distinguished from paramount governmental powers) is necessary to the effective exercise of its sovereign powers or to its control and regulation of the use of the overlying waters.[48]

The power of Congress to deal with such property was recognized as being "without limitation" in the *California* case.[49] Its power to convey these lands and minerals to the States and good faith claimants without parting with governmental powers or sovereignty (and therefore its power to agree that Texas was to retain its lands and minerals in the first instance) is clearly recognized.[50] Congress had the full power and authority to agree that Texas should keep its lands and minerals below tide water when it entered the Union just as it now has the power to quitclaim land below low-water mark on which much of the city of Boston,[51] Atlantic City piers, and Miami Beach hotels and piers have been built.

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[48] See note 19, *supra*.

[49] See pp. 23-24, *supra*.

[50] See notes 20, 21, *supra*. The State sovereignty cases applicable to inland waters cited in the majority opinion as being analogous here in reverse recognize that the ownership (economic use) of submerged soil and minerals may be severed from the sovereign without destroying any of its political rights or sovereignty. See especially quotation from *Weber v. Board of Harbor Com'rs*, 18 Wall. 57 (1873) contained in note 8 of majority opinion. (70 S. Ct. at 923.)

[51] Boston Bay, being more than ten miles wide from headland to headland, would be subject to the *California* case according to the memorandum of the United States (p. 20) submitted to the special master in that case on August 12, 1949.

Actual Practice Separates Ownership from Sovereignty

Having ceded to the United States its powers of national sovereignty relating to "foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like," Texas has recognized and admitted throughout this case that the ownership and use of its retained lands and minerals are subject to, and cannot interfere with, these national powers in the area in controversy any more than elsewhere within its boundaries.[52] Such powers are not in controversy here. This lawsuit actually involves only the ownership and economic benefits of the land and minerals. This was admitted by plaintiff.[53]

A full development of the evidence as to the actual uses of this property before and since 1845 will demonstrate that the contracting parties knew and followed the distinction between ownership (subordinate economic use and benefit) and sovereignty (paramount political powers) here the same as in the case of all other property within Texas' boundaries. It will further show that the State of Texas has been in continuous possession and full enjoyment of the land and its economic benefits since 1845 without

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[52] First Amended Answer p. 5; See Texas' Brief, pp.6-16.

[53] To eliminate any confusion between the proprietary right involved in this controversy and governmental powers which are not involved, the United States termed it:

> "whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea." (Plaintiff's brief, p. 16.)

such possession and use having resulted in a single instance of conflict or interference with the national governmental powers relating to commerce, navigation, defense, and international affairs.

It will show that the nation's international responsibilities have not been affected by the State's exercise of ownership of these lands and minerals any more than by State ownership of the lands and minerals under the Rio Grande River, which lies between the United States and Mexico, or under the Great Lakes between the United States and Canada, which have been held to be open seas.[54] the rights of ownership in the area are subject to, and have been exercised with due respect for, the international agreements, commitments, and responsibilities of the federal government, just as they are with respect to other property in all other areas of the State.

The paramount powers over commerce and navigation have been protected by federal laws which require that physical structures and other uses of lands under these waters must be approved by the United States Chief of Engineers the same as in inland waters.[55]

Nor has exercise of the power of national defense required that the ownership of these lands and minerals be in the federal government. In exceptional instances, when ownership of specific tracts was thought to be necessary, deeds have been sought and

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[54] *United States v. Rodgers*, 150 U.S. 249 (1893); *Illinois Central Ry. v. Illinois*, 146 U.S. 387 (1892).

[55] 30 Stat. 1151. As shown in Texas' Brief, pp. 10-11, the only wells now producing oil from this area do not touch the waters, the derricks being on the shore and the pipe being "slant drilled" to the subsoil lying beneath the waters. Thus they cannot possibly interfere with navigation, commerce, and public use of the waters.

obtained by the United States from the State.[56] Security measures necessary for the protection of the Texas coast can be shown to have been enforced by the federal government through two wars without ownership of the property. As to the oil and other minerals which have been needed for national defense, the federal government has always acquired them by outright purchase or under its powers of eminent domain. It has not heretofore taken without compensation this substance of economic value under the guise of regulation or protection. Oil requirements for the nation have been and can be met here under State operations the same as elsewhere in the State.[57]

The natural separation of the economic benefits of ownership from national governmental powers relating to commerce, navigation, defense, and international affairs is nowhere better demonstrated than in the federal proposal that property rights in the marginal belt be managed by the Department of Interior separately and apart from the control of

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[56] This was the procedure followed with reference to two sites for jetties extending over 2 miles into the Gulf off Galveston Island; a lighthouse site "covered by 4 or 5 feet of water"; and "tidelands" lying below low-water mark and adjoining Fort San Jacinto Reservation off the east end of Galveston Island. See Texas' Brief, p. 186 and first map opposite p. 4.

[57] Testifying concerning the ability of industry to make oil available in times of peace and war under the present policy of State control, former Secretary of the Interior Krug said:

> "They have done a miraculous job. I think they will continue doing a miraculous job, whether or not the United States gives up its ownership of these lands to the States." Report No. 1778, House of Representatives, 80th Cong., 2d Sess. (1948), by the Committee on the Judiciary on H. R. 5992.

defense and international responsibilities exercised by the Department of Defense and the Department of State, respectively.[58]

The evidence will show that the Department of Interior, if permitted to take over, would be exercising proprietary rights in the management, leasing, and control of the minerals under this land just as the State has been. No actual exercise of governmetal powers incident to "foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like" will be involved.

The effect of the Court's holding is to permit the federal government not only to control the use of these submerged lands in the exercise of its admitted national powers but also to use and appropriate the economic value of the property without relation to the actual exercise or necessity for exercise of those powers. No doctrine of subordination can obscure the fact that this would be a taking of beneficial use without compensation,[59] rather than a restriction regulation, or destruction incidental to the exercise of governmental power.[60]

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[58] S. 923, 81st Congress. This bill, recommended by the Attorney General, Secretary of the Interior, and Secretary of Defense, would authorize the Department of the Interior to lease the lands to private lessees for development of the oil and other natural resources and to put the money in the federal treasury.

[59] *United States v. Carmack*, 329 U.S. 230 (1946).

[60] The distinction between a taking of beneficial use without compensation (prohibited by the Fifth Amendment) and a non-compensable destruction resulting from the exercise of a national power has been uniformly recognized by this Court. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Legal Tender Cases*, 12 Wall. 457 (1870); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913).

A full development of the evidence will show clearly the total lack of conflict in the area between the paramount governmental powers of the federal government and the subordinate rights of ownership exercised by the State therein during the past 104 years. Also, it will negative any presumption that the parties intended that lands and minerals in this area were to follow national sovereignty any more than in other areas within the original boundaries of Texas.

There having been no conflict in actual practice between the exercise of the paramount federal powers and the enjoyment of ownership by Texas, there is no basis for concluding that an "equal footing" provision would require this ownership to follow national sovereignty, even if there had been such a provision. Similarly such a provision would afford no ground for ignoring or refusing to give effect to the agreement of the parties that Texas was to retain its ownership of these lands and minerals while at the same time relinquishing its national sovereignty.

IV.

The procedure employed by the Court in this original action is not in accord with its past practice and is unfair to the State of Texas.

As heretofore shown, the present original action involves complex issues and more than 100 years of interpretation of an international agreement by the parties. The issues had not been formed by the pleadings except in a most general manner. Defend-

ant could not tell what issues it was obliged to meet until plaintiff's brief was served on February 20, 1950. The defendant had only 33 days thereafter within which to prepare its brief, as compared with 77 days for plaintiff.

On the pleadings alone, without any record, and on the basis of its brief and two hours of oral argument, the State of Texas was required to submit its case to the Court for decision.

Despite the established practice of this Court in cases involving the interpretation of agreements of the type here involved and in the face of repeated requests by Texas for an opportunity to present its evidence, the Court has construed disputed provisions of an agreement between the United States and Texas, which on their face favor the right claimed by Texas, in favor of the United States without giving the State an opportunity to present evidence.

This summary action is without precedent in the legal history of this nation and is a serious departure from the principles governing the established practice of this Court in original proceedings, illustrated by the following pronouncements of three of its Chief Justices—Taney, Fuller, and White:

> ". . . in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength." (Chief Justice Taney in *Rhode Island v. Massachusetts*, 14 Pet. 210, 257 (1840).)

"In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this Court proceeds only upon the utmost circumspection and deliberation, and *no order can stand in respect of which full opportunity to be heard has not been afforded.*" (Chief Justice Fuller in *Iowa v. Illinois*, 151 U.S. 238, 242 (1894).)

"As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states involving grave questions of public law, determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, *to the end* that when the case comes ultimately to be disposed of finally and irrevocably . . . *there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard, has in any degree entered into the disposition of this case.*" (Chief Justice White in *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914).)

The petition for rehearing should be granted in order that Texas may have an opportunity to present evidence that its 104 years of possession and recognized ownership have not been by mere sufferance

or circumstance, but have been in accord with the intention of the parties to the annexation agreement in 1845.

STATEMENT AS TO PLAINTIFF'S PRAYER FOR ACCOUNTING

Plaintiff prayed for an accounting of "all sums of money derived by it [Texas] from the area . . . subsequent to June 23, 1947." Since the question of whether Texas is liable for any money and, if so, the amount, is incidental to the question of ownership,[42] it has not been discussed by the parties in their briefs and arguments or by the Court in its opinion. Neither has an opportunity been afforded for submission of evidence as to the liability of Texas, if any, its good faith, or its offsetting expenditures. Therefore, defendant refrains from going into these matters in this petition without prejudice and on the assumption that further proceedings will be had thereon if this petition for rehearing is not granted.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for rehearing and reconsideration of the majority opinion should be granted and that the majority opinion should be reversed and judgment rendered denying plaintiff's motion for judg-

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[42] Cf. *Mason v. United States*, 260 U. S. 545, 558 (1922); *Gulf Refining Co. v. United States*, 269 U. S. 195, 197 (1925).

ment on the pleadings and dismissing the complaint; or, in the alternative, that plaintiff's motion for judgment should be denied and defendant's motion for the appointment of a special master to hear the evidence should be granted.

Respectfully submitted,

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July 19, 1950.

Certificate

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

PRICE DANIEL
Attorney General of Texas

JOINT MEMORANDUM

IN SUPPORT OF REHEARING IN

UNITED STATES v. TEXAS

By

Joseph Walter Bingham
C. John Colombos
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PERSONAL DATA

JOSEPH WALTER BINGHAM: Chairman, The International Law Association Committee on Rights in the Sea Bed and its Subsoil, American Branch; Professor of International Law, Stanford University, 1907-1944; author, *Report on the International Law of Pacific Coastal Fisheries* and numerous articles on international law.

WILLIAM W. BISHOP, JR.: Assistant to Legal Adviser Department of State, 1939-1947; Legal Adviser United States Delegation Council of Foreign Ministers and Paris Peace Conference, 1946; author: *The Exercise of Jurisdiction for Special Purposes in High Sea Areas Beyond the Outer Limit of Territorial Waters*, 1949.

C. JOHN COLOMBOS: King's Counsel; Rapporteur, International Law Association's Committee on Neutrality, 1924, 1926, 1928, and 1932; author, *International Law of the Sea* (1943), *A Treatise on the Law of Prize* (3rd ed. 1949), and other works on international law.

GILBERT GIDEL: Member of the Institute of International Law; President of the Curatorium of the Academy of International Law at The Hague; French delegate, 1930 Hague Conference for Codification of the Law of Territorial Waters; author, *Le droit international public de la mer (The Public International Law of the Sea)* (1932-1934), 3 vols. (4th volume in preparation).

MANLEY O. HUDSON: Member and first chairman, United Nations International Law Commission; Judge Permanent Court of International Justice, 1936-1946; American adviser, 1930 Hague Conference for the Codification of International Law; Bemis Professor of International Law, Harvard University, 1923 to present; author of over 300 articles and publications on international law.

CHARLES CHENEY HYDE: Former Solicitor of the Department of State under Secretaries Hughes and Kellogg; Professor of International Law and Diplomacy, Columbia University, 1925-1945; author, *International Law Chiefly as Interpreted and Applied by the United States* (2nd rev. ed. 1945), 3 vols., and other works on international law; President of the American Society of International Law, 1946-1949.

HANS KELSEN: Legal adviser to the Austrian Government, and draftsman of the Federal Constitution of Austria, 1919-1922; Member of the Constitutional Court of Austria, 1921-1929; author, *General Theory of International Law* (1934), *General Theory of Law and the State* (1944), and other works on international law and jurisprudence.

WILLIAM E. MASTERSON: Department of State consultant, 1944-1947; adviser on research in international law, Harvard Law School; author, *Jurisdiction in Marginal Seas* (1929); co-author, *The International Law of the Future* (1944), and author of numerous articles on international law, constitutional law, and jurisprudence.

ROSCOE POUND: Professor of Jurisprudence and Dean of Harvard Law School, 1910-1936; Director of National Conference of Judicial Councils, 1938 to date; author of more than 850 books, articles, and addresses on jurisprudence, international law, constitutional law, etc.

STEFAN A. RIESENFELD: Professor of Law, University of Minnesota, 1938 to date; Special Consultant, Board of Economic Warfare, 1942-1943; author, *Protection of Coastal Fisheries Under International Law* (1942), and of numerous articles on international and comparative law in German and American legal periodicals.

FELIPE SANCHEZ ROMAN: Former member of the Permanent Court of Arbitration at the Hague; member of the Spanish National Academy of Jurisprudence and Legislation; Legal Adviser to Spanish and Mexican Governments; Professor of Civil Law at the Central University of Madrid, 1916-1936.

JOINT MEMORANDUM

Based upon our individual research and consideration of the pleadings, briefs, and evidentiary materials, each of us has prepared a separate memorandum opinion on the title to the lands and minerals underlying the Gulf of Mexico within the original boundaries of the State of Texas and the rules of international law applicable thereto. These memoranda were written at the request of the Attorney General of Texas prior to the Court's decision of June 5, 1950.

Without collaboration, each of us concluded:

1. The Republic of Texas, as an independent nation, had full sovereignty over and ownership of the lands and minerals underlying that portion of the Gulf of Mexico within its original boundaries three leagues from shore.[1] Under international law and under the domestic law adopted by the Republic of Texas, the ownership (*dominium*) of the subjacent soil and minerals was severable from the paramount governmental powers (*imperium*) employed in the original acquisition and in the regulation and control of commerce, navigation, defense, and international relations.

2. The transfer of national sovereignty and governmental powers relating to interstate and foreign commerce, navigation, defense, and international relations from the Republic of Texas to the United States in 1845 did not effect a transfer or relinquish-

[1] The First Congress of the Republic of Texas, on December 19, 1836, fixed the boundaries as follows: "... beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 1 Laws, Republic of Texas, p. 133; 1 Gammel's Laws of Texas 1193-1194.

ment of the ownership of the lands and minerals above described. International law, as it existed in 1845, did not imply or require a cession of these proprietary rights with a transfer of national sovereignty.

3. The Republic of Texas, upon annexation, did not cede to the United States the ownership of the controverted 2,608,774 acres of lands and minerals within its original boundaries, but specifically retained this ownership under the terms of the agreement between the Republic of Texas and the United States.

4. A contrary position, first asserted by the United States 103 years after the international agreement of annexation, creates a dispute as to the meaning of the controlling documents. Under such circumstances either litigant should be entitled to present evidence bearing upon the intention of the contracting parties.

5. Available evidence of the status of international law, reflected by the customs, usages, and practices of nations in 1845 and since that date, will support the foregoing conclusions of fact and law.

After studying the majority and dissenting opinions of June 5, 1950, each of us has written a separate memorandum directed to issues raised by the majority opinion which we respectfully submit require a rehearing and judgment for Texas or at least a trial on the evidence. In the interest of brevity, this joint memorandum is submitted as a summary of our individual opinions and of the evidence of relevant customs, usages, and practices of nations which we will develop fully if given the opportunity at a trial of the case on its merits.

I.

In the first instance, the majority opinion in its concept of the nature of a nation's sovereignty over and ownership of marginal belt lands and minerals is not in harmony with international law as it existed in 1845 and as it continues to exist at the present time.

The majority has written:

> "... once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . ."[2]

There is no accepted authority in international law for this notion of "international domain." To the contrary, it may be said that customs, usages, and practices of nations in and since 1845 indicate complete agreement that the territorial marginal sea and its subjacent soil and resources within its boundaries are under the full sovereignty of the littoral nation, subject only to the accepted rules of "innocent passage" through the overlying waters.

Under international law as it existed in and since 1845, the "international domain" did not, and does not now, begin at the low-water mark of a littoral state. *Vis-a-vis* other nations, the area of a littoral state between low-water mark and the seaward limit of its marginal belt was and is in the same category

[2] 70 S. Ct. at 924.

as its inland waters, uplands, and other territory within its boundaries.[3] As said by Wheaton in 1836,

> "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." Wheaton, *Elements of International Law* (Philadelphia, 1836) 142-143.

Sala wrote in 1845 that customs and usages of nations have "converted the sea as to this portion thereof into property no different than the lands occupied by them."[4] Hautefeuille described territorial seas as under littoral state dominion "in the same manner and by the same title as the land."[5] Many writers term it a continuation of the continental territory. Olivart says "the jurisdiction of the state over its territorial sea is exclusive as it is over its land territory."[6] Among the jurists and publicists

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[3] The only limitation or exception is that by mutual consent and established practice there exists a right of "innocent passage" for ships of other nations. But as said by the Italian publicist, Scipione Gemma: "The limitations implied by the right of innocent passage of foreign vessels and by certain exemptions applicable to them in matters of civil and criminal local jurisdictions exercised by the coastal nations are not enough to consider the littoral sea as something different from the national territory." Gemma, *Appunti di diritto internazionale* (Bologna, 1923) 187.

[4] Sala, *Sala Mexicana, o sea La Ilustración al Derecho Real de España* (Mexico, 1845), vol. 2, p. 11.

[5] Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime.* (Paris, 1848) 231. He continued: "There is continuous, complete, and absolute possession, as there might be of a river, a lake, or piece of land territory." (p. 232.)

[6] 1 Olivart, *Tratado de Derecho Internacional Público* (Madrid, 1903) 204.

there is almost complete unanimity of opinion on this point.[7]

It is respectfully urged that no matter what the United States may gain in this case by a holding that the Texas marginal sea is "international domain," such gain could be far outweighed by the consequent gratuity to other nations. Implicit in the denomination of the area as "international domain" is the possibility of other nations having rights therein other than innocent passage through the waters. Spain, Mexico, France, England, Russia, and other nations can make no reasonable assertion of an interest in the oil and other minerals within the three-league Gulfward boundary of Texas so long as this Court recognizes that the area was removed from international domain when it became a part of the Republic of Texas. This was accomplished by the Republic of Texas in accordance with international law as recognized at the time by the countries named and by all other civilized nations. A contrary conclusion by the United States Supreme Court could well be used by other nations as an opening for claims not now asserted.

The Court's holding in this regard is contrary to the official position of the United States as expressed

[7] See "Summary of Available Opinions of Jurists and Publicists—1670-1950," pp. 18-50 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment. See especially quotations from Molloy and Pufendorf (p. 18), Vattel (p. 19), Lampredi (p. 20), Rayneval (p. 21), Azuni and Schmalz (p. 22), Wheaton (p. 24), Cussy and Gardner (p. 27), Casanova (p. 29), Field (p. 30), Fiore and Martens (p. 31), Pradier-Fodéré (p. 33), Hershey (p. 38), Fenwick and Möller (p. 43), Bustamante (p. 45), Gidel and Baldoni (p. 46).

by the Department of State and by Presidential Proclamations. The official view of the United States at the League of Nations Conference at The Hague in 1930 was declared as follows:

> "... the sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or the individual states where they border."[8]

The Continental Shelf Proclamations and Executive Orders of the President of the United States on September 28, 1945, do not regard the bed of the continental shelf as "international domain." On the contrary, the Proclamation regards the land and resources below low tide "as an extension of the landmass of the coastal nation and thus naturally appurtenant to it" and wholly unaffected by "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation."[9] The Executive Order recognizes that ownership of the subsoil and sea-bed is possible either in the States or the United States.[10]

There is no authority in international law for the doctrine that property rights in the marginal sea must "be so subordinated to political rights as in substance to coalesce and unite in the national sover-

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[8] Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, C. 74. M. 39. 1929. V. p. 128.

[9] 3 C. F. R., 1945, Supp., Proc. 2667, 13 Dept. State Bull. 484, 485 (1945).

[10] 3 C. F. R., 1945, Supp., E. O. 9633.

eign." On the contrary, international law in and since 1845, and all domestic law with which we are acquainted, recognizes that political rights *(imperium)* are separate and severable from property rights *(dominium)* in the subsoil and minerals of the marginal belt the same as in any other soil and minerals within a nation's territory.[11] The use of the soil may be more limited by governmental restrictions and regulations designed to protect public use, innocent passage, and navigation of the waters generally, but restrictions and regulations on property use have not been understood to vest ownership of the property in the governmental power which imposes the restrictions and regulations.

There is no obligation or responsibility of a nation to other nations which requires it, rather than one of its political subdivisions, to own the soil and minerals within its territorial marginal belt, so long as it has governmental powers which guarantee innocent passage for ships of other states. The exercise of this responsibility and all other responsibilities connected with foreign and interstate commerce, defense, and international relations, is wholly separate from and does not depend upon the economic use and profits connected with the proprietorship of this subsoil and minerals any more than it does the subsoil and minerals beneath uplands, inland waters, and all areas of the nation's territory.

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[11] It is believed that evidence of the practice of nations in 1845 will show that they treated original ownership of the subsoil and minerals of the marginal belt as within the same legal regime and property law as was applicable to other unsold and unappropriated lands within their boundaries.

Such was the status of international law when the Republic of Texas and the United States entered into their agreement for the annexation of Texas. A transfer of marginal sea lands and minerals was not then implied in a transfer of national sovereignty. An express cession or other clear terms indicating a transfer of these proprietary rights was as necessary then as it would be now to effect such a result. As recently said by one of the co-authors of this memorandum:

> "In this day when world governments are being planned it is important that *dominium* is not confused with or inextricably tied to *imperium*. . . .
>
> "Assume that all of this nation's powers of external sovereignty, international relations, and defense were transferred to a United Nations of the World. This transfer of external sovereignty should not be held to carry with it any proprietary rights theretofore acquired by the United States in the marginal belt of the original States and California in the absence of a cession of the property.
>
> "Such is the situation which existed between Texas and the United States in 1845. Texas transferred its external sovereignty and certain enumerated properties which then pertained to its national defense. It ceded no other property. This is confirmed by a specific reservation of all 'vacant and unappropriated lands lying within its limits.' The subsoil and minerals remained in the State just as the subsoil and minerals of the California belt would remain in the United States if it should transfer external sovereignty to a larger federation of States without ceding

its rights of a proprietary nature beneath the marginal sea of California."

II.

Even if the Court believes that the lands and minerals in question would ordinarily pass to the United States with national political rights, this would not be true if the parties made an agreement to the contrary at the time of annexation.

In this case there is an international agreement which contains a specific retention of lands lying within the limits of the Republic of Texas.[13] It is of the same nature and has the same effect as a treaty or contract between independent nations. Therefore, rules of interpretation applicable to treaties, conventions, and other international agreements apply. The object of the interpretation of an agreement of this nature is to discover the understanding and intention of the parties at the time the contract or agreement was entered into.

Texas has a specific allegation at page 15 of its First Amended Answer that:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly cre-

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[12] Roscoe Pound, "Rights Involved in United States v. Texas," pp. 10-11, Memoranda and Appendix, Brief for the State of Texas in Opposition to Motion for Judgment.

[13] 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228.

> ated State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic, as well as the right to take, use, and develop the lands and minerals, subject only to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above."

If it be found, as alleged by Texas, that the parties intended by the terms of the agreement that the lands and minerals beneath the marginal belt were to be retained by Texas the same as other lands and minerals within its limits, no other provision of the agreement should be permitted to defeat this intention. Thus, a controlling issue in this case is the fact question of whether the parties intended the retention clause to be effective to the extent of the "limits" of Texas, as the terms imply, or only as far as low-water mark.

The applicable rule in such cases is stated in the majority opinion as follows:

> ". . . If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."[14]

If this case is not determined in favor of Texas on the law and terms of the documents alone, it should not be determined against Texas without allowing it the opportunity for introduction of evidence and a

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[14] 70 S. Ct. at 922.

full hearing. It is our opinion that the answer to the dispute will be found in diplomatic correspondence, contemporary and subsequent construction, usage, and international law under which the parties were dealing in 1845.

In so far as international law is concerned, it was possible in 1845 for one nation to join another and retain the lands and minerals underlying the marginal sea within its boundaries.

This was and is possible also in so far as the domestic law of the United States is concerned. Counsel for the United States itself have not contended that ownership of the marginal belt lands and minerals is an inseparable attribute of national sovereignty.[15] In the Government's brief in *United States v. California*, 332 U.S. 19 (1947), it was said:

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea." (p. 89.)

The Court, in that case, also recognized that ownership of this property is not a necessary incident of national sovereignty or essential to the exercise

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[15] Solicitor General Perlman, in answer to a question by Mr. Justice Reed during the argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh, yes, Congress could give whatever title it has, whatever rights it has, to the States." Argument, *United States v. Texas*, May 9, 1949, Reporter's Transcript, p. 6.

of federal constitutional powers over the area, when it said that the power of Congress to deal with such property "is without limitation."[18]

Implicit in the powers of the United States Congress to convey these lands and minerals to the states and good faith claimants, and to admit new states is the power to admit Texas to the Union under an agreement that Texas retain the lands and minerals in the first instance.

The Texas Annexation Agreement of March 1, 1845, whether classed as a treaty, act, or joint resolution, was passed by Congress and carried into effect by the President, who is charged with the conduct of international affairs. This agreement provides that:

> "... said state, when admitted into the Union ... shall also retain all the vacant and unappropriated lands lying within its limits. ..."

Thus as to Texas, Congress has acted with regard to the specific question before this Court. The Congress of Texas, and the people in convention assembled, agreed to annexation with this as one of the

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[18] *United States v. California*, 332 U.S. 19, 27. Also in stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court added: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. See *United States v. Texas*, 162 U.S. 1, 89, 90; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32." *Id.* at 40.

"conditions" and "guarantees."[17] There is no evidence in the terms of the agreement that the parties meant to retain only those lands lying above low tide on the coast. The retention clause says *"lands lying within its limits."* Neither is there any evidence in the terms that the parties intended the lands and minerals of the three-league marginal belt to "coalesce and unite" with the political powers of national sovereignty transferred to the United States. Under the domestic law of the Republic of Texas, these lands and minerals involved rights of property, severable from sovereignty, but originally held by the sovereign in trust for the people.

The constitution of the new State, adopted in accordance with the terms of the annexation agreement and as a part of the annexation procedure, indicates that these property rights were to remain as they were under the laws of the Republic of Texas. It included this provision:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[18]

This Constitution was laid before the United States Congress and was approved by that body in the final Act of Admission as being "in conformity

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[17] 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228. The Annexation Resolutions of the two nations are set out at length on pages 58-62 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment.

[18] Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

to the provisions" of the annexation resolution. 9 Stat. 108.

On the basis of these documents it would appear that Texas retained the lands and minerals in question by the specific agreement and approval of the United States Congress. The only doubt cast on the meaning of the documents is the contention by the United States that the "retention clause" was not intended to include lands and minerals below low tide and the statement in the majority opinion that an "equal footing" clause in the annexation resolution of March 1, 1845, effected a relinquishment of the property to the United States.

The "equal footing" clause in the March 1 resolution for annexation of Texas was contained in Section 3, which was an alternative proposal never submitted to, or considered or accepted by, Texas. Sections 1 and 2 contained the "proposals, conditions, and guarantees" submitted by the President of the United States and accepted by the Congress and the people of Texas. These sections provided that Texas retain its lands and pay its own debts. It is significant that they contained no "equal footing" clause. Only the unilateral final act of admission referred to "equal footing," but it also recited that admission was granted in accordance with the "proposals, conditions, and guarantees contained in the first and second sections" of the March 1, 1845, annexation resolution. It could not have the effect of taking from Texas lands and minerals which had been specifically retained by the "proposals, conditions, and guarantees" theretofore agreed upon. Texas pleads that it has evidence which will show that no such meaning or effect was intended by the contracting parties.

If, upon rehearing, judgment is not rendered in favor of the State of Texas on the basis of the terms contained in Sections 1 and 2 of the annexation agreement and its failure to cede the lands and minerals, it would indicate that some doubt still exists in the minds of the majority as to the meaning of the annexation agreement and the intention of the parties. In that event, Texas should be entitled to an opportunity to present its evidence. This was requested by Texas in its motion for the appointment of a Master and in its brief in opposition to the motion of plaintiff for judgment on the pleadings. We submit that the Court should reconsider its ruling denying Texas this opportunity to develop evidence as to the intention of the parties to this international agreement.

Evidence which can and will be submitted as to the customs, usages, and practices of nations in and since 1845, the nature of the sovereignty over and ownership of marginal belt lands and minerals in international law, and all other relative interpretative matters, will support the contentions of the State of Texas as to the law and facts applicable to this case.

Respectfully submitted,

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July 14, 1950

CONCURRENCE

Time has not permitted me to assist in the preparation of this memorandum, but I am fully in accord with the position taken by the State of Texas in its brief and argument in this case. I wholeheartedly concur in the opinion that there should be a rehearing, and a judgment for Texas or at least a trial on the evidence.

WILLIAM W. BISHOP, JR.

July 15, 1950